Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Telecommunications Services Inside Wiring	)	CS Docket No. 95-184
	)	
Customer Premises Equipment	)	
	)	
	)	
In the Matter of	)	
	)	
Implementation of the Cable Television Consumer Protection and Competition Act of 1992:	)	MM Docket No. 92-260
	)	
Cable Home Wiring	)	

To: The Commission

COMMENTS OF MEDIA ACCESS PROJECT AND CONSUMER FEDERATION OF AMERICA

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SUMMARY

The Commission's proposals concerning the disposition of home run and home wiring are both unlawful and puzzling. They are unlawful because the Commission ignores not one, but *two* clear Congressional mandates that give ***citizens*** the power to choose among MVPDs. They are puzzling because even though the Commission has correctly observed that landlords stand in the way of viewer choice, and that it must do more to ensure that viewers who live in MDUs can choose among MVPDs, its proposals would place landlords in gatekeeper positions able to prevent their tenants from exercising that choice. This is contrary to the "paramount" First Amendment right of viewers to have access to a multiplicity of sources of views and information.

The Commission's proposals would unlawfully ignore Congress' twice-stated command to promote subscriber choice between MVPDs. In Section 624 of the 1992 Cable Act, Congress directed the Commission to provide for subscriber ownership of inside wiring when a subscriber terminates service. In the 1996 Telecommunications Act, Congress once again expressed this preference for individual choice, and in Section 207 it ordered the Commission to preempt all restrictions on a viewer's ability to receive programming through over-the-air reception devices such as DBS dishes and MMDS and over-the-air broadcast antennas. Outrageously, the Commission has not even mentioned its pending proceeding to implement Section 207. Failing to make home run and home wiring available to tenants would render useless the Commission's actions to prevent restrictions on the use of over-the-air reception devices.

The Commission's proposal for home run wiring is flawed in three significant ways. First, it would not even apply in a significant percentage of cases. The Commission refuses to take any action at all in states where statutes grant the incumbent a mandatory right of access, or in cases where the incumbent has signed contracts giving it exclusive access.

Second, even if the proposal does apply, it places landlords, rather than tenants, in the

position of choosing between MVPDs. Not only does this proposal ignore the twice-stated intent of Congress to promote individual subscriber choice, but it relies on an indefensible assumption that landlords will protect the needs and interests of their tenants. Indeed, the Commission ignores the substantial revenue many landlords receive from exclusive contract arrangements with incumbent MVPDs and vastly overestimates the ability of, and the motivation for, landlords to protect their tenants' viewing needs.

Third, the proposal is flawed because it offers departing incumbent MVPDs the opportunity to remove the wiring for anticompetitive reasons. By removing wiring, incumbent MVPDs could force alternative providers to undergo the delay and expense to install their own home run wiring and threaten landlords with the prospect of building damage and tenant complaints. Therefore, the Commission should require the incumbent MVPD first to offer to sell the wiring first to the subscriber, and then to the MDU owner or the alternative MVPD. Only after these parties decline should it be allowed to remove or abandon it.

The Commission's proposal for home wiring also unlawfully ignores the plainly stated intent of Congress. In building-by-building switchovers, it would give landlords the right to purchase the cable home wiring, even though Section 624 plainly specifies that subscribers should have this right. The Commission's excuse for replacing subscribers with landlords, that it will be easier for the MVPD, ignores the fact that MVPDs routinely perform such administrative functions. The Commission should also improve its home wiring rules by (1) defining the "physical inaccessibility" of the demarcation point based upon whether accessing the point would either require modification or damage of structural elements, or would add significantly to the cost, and (2) mandating sharing of hallway molding and conduits whenever physically possible. Finally, it should adopt a rule governing all future installations of home run and home wiring that gives tenants the first opportunity to purchase them.

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Media Access Project and Consumer Federation of America ("MAP/CFA") respectfully submit these comments in response to the Commission's *Further Notice of Proposed Rulemaking*, FCC No. 97-304 (released August 28, 1997) ("*FNOPR*") in the above referenced dockets. The *FNOPR* requests comment on a number of proposals for the disposition of cable home run wiring and home wiring so as to "promote competition and consumer choice." *FNOPR* at ¶2.

I. INTRODUCTION

The Commission's newest proposal for the disposition of MDU home run[1] and home

[1]In non-loop-through wiring configurations, each subscriber in an MDU has a dedicated line, the "home run," running to his or her premises from a common "riser" or "feeder line" that serves as the source of video programming signals for the entire MDU. *FNOPR* at ¶4, 7. The home run wiring starts from the point at which the wiring becomes dedicated to serving an individual subscriber's unit to the "demarcation point" (currently set at 12 inches outside of where the wiring enters the subscriber's home or individual dwelling unit). *Id.*

wiring[2] leaves subscribers at the mercy of their landlords. This is as puzzling as it is disappointing, since the Commission now appears to have realized that "property owners' resistance to the installation of multiple sets of home run wiring" has been a major factor in denying multiple dwelling unit building ("MDU") residents[3] the ability to choose among competing multichannel video programming distributors ("MVPDs"). The Commission says that "more is needed to foster the ability of ***subscribers*** who live in MDUs to choose among competing service providers," *FNOPR* at ¶25, but its proposal does little to achieve that goal.

If adopted, the Commission's plan would run afoul of Congress' intent in enacting Section 624 of the Cable Act of 1992, Pub. L. No. 102-385 ("1992 Cable Act"), 47 USC §544(i), and Section 207 of the 1996 Telecommunications Act. Pub. L. No. 104-104 (1996) ("1996 Act"). More importantly, it would impede the "paramount" First Amendment right of viewers to have access to a multiplicity of sources of news and information. MAP/CFA Comments to 1996 Inside Wiring Notice of Proposed Rulemaking and Home Wiring Further Notice of Proposed Rulemaking at 2-4 ("1996 MAP/CFA Comments"). *See also, Turner Broadcasting System v. FCC*, 114 S.Ct. 2445, 2470 (1994); *Red Lion Broadcasting v. FCC*, 395 U.S. 367 (1969); *Associated Press v. United States*, 326 U.S. 1, 20 (1945); *Time Warner Entertainment Co. v. FCC*, 93 F.3d 957

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[2]The Commission has defined "cable home wiring" as the internal wiring contained within the premises of a subscriber which begins at the demarcation point. 47 CFR §76.5(ll).

[3]MAP/CFA also observe that many small- and medium-sized business are located in buildings with multiple office units. These businesses are increasingly realizing the promise of interactive, broadband media for conducting transactions and communications that are rich with data sharing and one-way and two-way multimedia communications. As this occurs, these entities also need an ability to choose among competing video service providers and other providers of access to broadband networks. In the name of promoting such choice and competition, the Commission should consider the application of its inside wiring rules to multiple office unit buildings as well as MDUs.

(D.C. Cir. 1996).[4]

The failure of the Commission even to mention its proceeding to implement Section 207 of the 1996 Act is particularly startling. Section 207 requires the Commission to preempt "restrictions that impair a viewer's ability to receive video programming services" through DBS dishes and broadcast and MMDS antennas. Yet, under the Commission's proposal, "restrictions" abound that could prevent viewers from attaching inside wiring to these over-the-air reception devices. The Commission cannot consider either proceeding without the other.

In their March 18, 1996 comments filed in the inside wiring and home wiring proceedings, MAP/CFA and other parties advocated that the 12 inch demarcation point for home wiring be moved to a location where it first becomes distinguishable from the common wiring. *E.g.*, 1996 MAP/CFA Comments at 10-12; 1996 NYNEX Comments at 7. But the Commission's *FNOPR* barely addresses this option, which would place control of wiring where Congress intended it to be - with subscribers.

Instead, the Commission has proposed a system for the disposition of home run wiring that is not only flawed for its reliance on landlords to make decisions for viewers, but also in the narrowness of its application. The Commission's proposal would apply only where "the in-

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[4]Protection and advancement of this right is a principal goal of the Communications Act, and is an explicit, overarching purpose of 1992 Cable Act of which the home wiring provision was a part. Congress has long sought to "assure that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services ***to the public***." 47 USC §521(4) (emphasis added). In the 1992 Cable Act, Congress reaffirmed this commitment to subscribers, finding that "[t]here is a substantial governmental and First Amendment interest in promoting a diversity of views provided through multiple technology media," 1992 Cable Act, §2(a)(6), and that its policy was to "promote the availability ***to the public*** of a diversity of views and information through cable television and other video distribution media." *Id.* at §2(b)(1) (emphasis added).

cumbent provider no longer has an enforceable legal right to remain on the premises against the will of the MDU owner" *FNOPR* at ¶34. This unlawfully affords no protection to a vast number of viewers, since it would not permit alternative MVPDs to have access to MDUs in the large number of states with mandatory access statutes for incumbents or in cases where exclusive contracts provide for monopoly access.

If the Commission is unwilling to move the demarcation point as proposed, then it must alter its proposal to ensure that the intent of Congress and the command of the First Amendment are satisfied. To do so, the agency should

- place control of the disposition of any home run and home wiring in the hands of viewers, and not landlords;
- preempt mandatory access statutes and exclusive contracts that give incumbents competitive advantage; and
- permit removal of home run wiring only if the subscriber, the MDU owner, and the alternative provider decline to purchase it.

II. THIS PROCEEDING IS ESSENTIAL TO THE OUTCOME OF, AND SHOULD BE CONSIDERED TOGETHER WITH, THE PENDING PROCEEDING TO IMPLEMENT SECTION 207 OF THE 1996 ACT.

It is dumbfounding that the Commission is considering this proceeding separately from another which is integrally related - the implementation of Section 207 of the 1996 Telecommunications Act. Section 207 governs preemption of regulations and private restrictions that impair a viewer's ability to receive video programming services using over-the-air reception devices.[5]

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[5]Section 207 of the 1996 Act provides: "Within 180 days after the date of enactment of this Act, the Commission shall, pursuant to section 303 of the Communications Act of 1934, promulgate regulations to prohibit restrictions that impair a viewer's ability to receive video programming services through devices designed for over-the-air reception of television broadcast signals, multichannel multipoint distribution service, or direct broadcast satellite services." 1996 Act, §207.

See Report and Order and Further Notice of Proposed Rulemaking, Preemption of Local Zoning Regulation of Satellite Earth Stations, 11 FCC Rcd 5809 (1996) ("*Preemption Further NOPR*"). By failing even to mention the Section 207 proceeding in the *FNOPR*, the Commission has lost sight of the bigger legal and policy picture. Much of what the Commission has done, or will do in the future, to prohibit local regulations and private restrictions that inhibit viewers from receiving video programming through DBS dishes, MMDS or over-the-air broadcast antennas, will be rendered useless if it does not also make home run and home wiring readily available. For this reason, the Commission must consider these matters together.[6]

In the preemption proceeding, the Commission is considering whether to prohibit MDU owners and condominium associations from imposing restrictions on the installation, maintenance, and use of devices such as television and MMDS antennas and DBS dishes. *Id.* In response to concerns about the aesthetics of each tenant installing her own dish or antenna, MAP/CFA and others have presented an alternative, *i.e.*, several tenants connecting to one or more common antennas *via* home run or other inside wiring. Comments of CFA, *et al.* to *Preemption Further NOPR* at 5-6. This solution would enable citizens to choose among several competing MVPDs, thus satisfying both Section 207 and the First Amendment rights of viewers. But this solution

[6]Indeed, in recent testimony before the House Judiciary Committee, Chairman Hundt identified both the Section 207 and the inside wiring proceedings as critical to the Commission's goals of "competition...in the communications markets [that] will yield lower prices and more choices for consumers, rapid technological innovation and a stronger economy." Statement of Reed E. Hundt on The State of Competition in the Cable Television Industry, Before the Committee on the Judiciary, U.S. House of Representatives, September 24, 1997. The Chief of the Cable Services Bureau also recently identified the Section 207 proceeding as critical to "promote competition and consumer choice." Statement of Meredith J. Jones, Chief, Cable Services Bureau, September 23, 1997. That the Commission has identified the same goals of promoting competition and choice in both proceedings makes their isolation from one another all the more confounding.

would be rendered nugatory if, in the instant proceeding, viewers are not given the flexibility to attach to these common antennas in the first place.

Anything that the Commission might do in this proceeding that would interfere with viewers' ability to receive multichannel video services would violate the plain language and legislative history of Section 207. That section requires the Commission to adopt regulations "to prohibit ***restrictions*** that impair a viewer's ability to receive video programming services." 1996 Act, §207 (emphasis added). The legislative history shows that Congress intended "restrictions" to be defined very broadly, including, but not limited to:

> restrictive covenants or encumbrances that prevent the use of antennae designed for off-the-air reception of television broadcast signals or of satellite receivers designed for receipt of DBS services. Existing regulations, including but not limited to, zoning laws, ordinances, restrictive covenants or homeowners' association rules, shall be unenforceable to the extent contrary to this section.

H.R. Rep. 104-204, 104th Cong., 1st Sess. at 124.[7]

As MAP/CFA argue below, mandatory access statutes, exclusive contracts and even the whims of a landlord can permit incumbent video providers to maintain monopoly access to MDUs at the expense of alternative video providers such as DBS and MMDS. As such, they constitute "restrictions" on a viewers' right to receive video programming services guaranteed by Section 207.

The interrelation of this rulemaking and the Section 207 proceeding is evident. It is now up to the Commission to harmonize them to ensure that viewers have a real choice between

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[7]The Conference Committee adopted the provision in the House Bill, H.R. 1555, with the minor amendment of adding MMDS to the list of protected services. H.R. Conf. Rep. at 51. The Senate Bill, S. 652, had no such provision. Thus, the House Report is the controlling legislative history on this provision.

MVPDs.

III. THE COMMISSION'S PROPOSAL FOR THE DISPOSITION OF HOME RUN WIRING IS FLAWED BECAUSE IT WOULD NOT APPLY IN MANY CASES AND WOULD PLACE THE ABILITY TO CHOOSE AMONG MVPDs IN THE HANDS OF LANDLORDS, NOT CITIZENS.

The Commission seeks comment on its proposals for the disposition of home run wiring, which would be triggered only in those instances where the incumbent MVPD no longer has an enforceable legal right to remain on the premises, such as a mandatory access statute or a contractually-created right. *FNOPR* at ¶34. In those cases, the MDU owner may choose whether to convert the entire building to a new MVPD, or to allow two MVPDs to compete side-by-side for individual units. *Id.* at ¶32. If the owner selects the building-by-building scenario, the incumbent must then elect whether to remove the home run wiring and restore the MDU to its prior condition, abandon and not disable the wiring, or sell the wiring to the MDU owner. *Id.* at ¶35. If the owner selects the unit-by-unit scenario, the incumbent must make a choice, which binds all future subscriber switches, whether it will remove, abandon, or sell the home run wiring dedicated to the individual units. *Id.* at ¶39.

The Commission's proposal will not solve the problem it has identified, that "more is needed to foster the ability of subscribers who live in MDUs to choose among competing service providers," *FNOPR* at ¶25, because it fails to deal with the greatest obstacles to citizen choice. First, because the proposal only applies where the incumbent has no "enforceable legal right to remain on the premises," it would fail to cover a significant proportion of cases. Second, it makes MDU owners gatekeepers for what MVPDs viewers are able to choose. Finally, because it permits incumbents to choose to remove home run wiring before it gives subscribers an opportunity to buy the wiring, it could place significant anticompetitive roadblocks in front of

alternative providers.

A. The Proposal Will Fail To Provide For Viewer Choice In States That Have Mandatory Access Statutes And Where There Is A Contractual Right Of Access.

Both of the Commission's proposals apply only in cases where the incumbent does not have a legally enforceable right to remain on the premises. *FNOPR* at ¶¶35, 39. The Commission defines a legally enforceable right as "where the incumbent provider has a contractual, statutory, or common law right to maintain its home run wiring on the property." *Id.* at ¶34. It makes clear that it does not propose to preempt any rights the incumbent has under state law, and that it will presume the incumbent does not have a right to remain unless the incumbent can adduce a clear contractual or statutory right. *Id.*

By refusing to preempt either access statutes or contractual rights of access, such as exclusive contracts, the Commission has created an exception that swallows the rule. The Commission itself notes that up to 20 states have access statutes, *FNOPR* at ¶29, so the benefits of competition would be completely foreclosed to MDU tenants in these states. In the remaining states, many contracts will contain clauses that give the incumbent an enforceable right to remain. *FNOPR* at ¶31. As the Commission itself has stressed, these provisions were frequently created in an era of accepted monopoly; their terms are unclear, but incumbents have not been reluctant to invoke them aggressively for the purpose of keeping competition at bay. *Id.*

B. The Proposal Will Fail To Enable Viewers To Choose Among MVPDs Because It Places Landlords In A Gatekeeper Position.

Another critical flaw in the Commission's plan is that it improperly places control over the disposition of home run wiring in the hands of landlords - not in the hands of viewers where Congress has said that it belongs. This is especially indefensible since the Commission has

already determined that landlords have obstructed tenants' ability to choose among competing MVPDs. *FNOPR* at ¶26.

The Commission has posited that the MDU owner would be constrained by the forces of a competitive real estate market to select an MVPD provider that provides his or her tenants with the best value for the money. *FNOPR* at ¶47.[8] But this sizable assumption, supported by no more than the self-serving assertions of MDU owners, *id.*, places undue confidence in the ability and intentions of landlords to represent their tenants. Landlords are profit maximizers, and therefore would be more concerned with accumulating the greatest amount of revenue in return for the lowest risk of damage, long-term investment, or variable costs. The Commission has ignored a major source of revenue for MDU owners, namely, exclusive contracts, while overestimating the costs they would perceive in staying with the incumbent MVPD. Finally, different individuals have different viewing preferences and needs and would choose an MVPD that best meets those preferences, but there is little incentive for an MDU owner to know or to care what his tenants would choose.

1. Landlords Will Be Reluctant To Switch Because They Profit From Exclusive Contracts, And The Commission Should Narrowly Confine The Use Of Such Contracts.

The Commission has made a significant error in disregarding one of the primary reasons for landlords' reluctance to permit alternative MVPDs on their premises - the fact that they

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[8]Similarly, several MDU owners who commented to the *First Order on Reconsideration and Further Notice of Proposed Rulemaking*, Cable Home Wiring, 11 FCC Rcd 4561 (1996) ("*1996 Inside Wiring Further Notice*"), observed that to attract and retain residents, a building owner would want to provide the best possible building environment at the most reasonable cost. *FNOPR* at ¶14 n. 40, *citing* Comments of Multimedia Development Corp. at 14-15; Comments of Building Owners and Managers Association International, *et al.* at i-ii.

frequently benefit from exclusive contracts with the incumbent MVPD. Under such arrangements, the landlord receives a percentage of the subscription revenue the incumbent earns from the building in return for granting that incumbent the right to be the exclusive provider of service for the building. Thus, the only way for an alternative MVPD to compete would be to offer the owner a greater amount of revenue under its own arrangement after the exclusive contract has expired. Even if that occurs, it does not address the real stakeholders in the system - the public. This scheme would still afford no choice for individual tenants.

The Commission has nevertheless indicated that it will defer discussion of the competitive impact of exclusive service contracts until a later proceeding. *FNOPR* at ¶3. It should not. This would ignore an essential element of the competitive landscape facing MVPDs in the MDU market. Its reliance on MDU owners as gatekeepers for citizen choice is especially misplaced where, as here, the Commission would be blind to a major force preventing owners from choosing a different MVPD.

Some alternative MVPDs have supported exclusive contracts as a method to guarantee recovery of the up front costs for new installations in an MDU or for retrofitting existing home run systems. These providers claim that without such contracts, they will be unable to raise investment capital and will risk losses if the landlord were to switch to a third provider or back to the incumbent MVPD. For example, OpTel has presented the Commission with evidence that, in cases where the home run wiring has already been installed, it takes an alternative provider 3.4 years at present rates to defray these costs. Letter of Henry Goldberg, Counsel for OpTel Inc., to FCC Chairman Reed E. Hundt, February 7, 1997 in CS Docket No. 95-184 ("Goldberg Letter").

MAP/CFA agree that these considerations may justify ***limited*** use of exclusive contracts, but this is not a valid basis to allow such contracts indefinitely. They would insulate the MVPD from competition and lead to higher rates and inferior service. Thus, the Commission should preempt exclusive contracts, except in certain narrow instances described below, where they are limited in duration and applicability.

If the Commission were to allow such exclusive contracts, it must limit their use only to alternative MVPDs. Incumbent MVPDs have already had many years of service in monopoly positions during which they should have more than offset their construction costs. Moreover, the Commission must strictly limit the duration of exclusive contracts, so that there is a periodic option of switching to a competing provider. Although unit-by-unit switching would still be more competitive, these limited duration contracts would at least provide some measure of competition. MAP/CFA would support exclusive contracts for alternative providers of no longer than 5 years. Finally, the Commission should adopt measures to ensure that the alternative provider is not able to use this limited exclusive contract to foreclose competition at the end of the 5 year period.

2. Landlords Will Not Be Constrained By The Housing Market To Provide Tenants With The Most Valuable MVPD Service.

The Commission's suggestion that the competitive real estate market will compel landlords to provide tenants with the best multichannel video value has no support in the record or in logic. The notion that landlords would be motivated by a fear that their tenants will move out is fanciful.[9] *Id.* at ¶¶14 n. 40, 47.

In the first place, to require dissatisfied tenants either to tolerate the landlord's choice or

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[9]In any event, it is impossible for an MDU owner to represent adequately all tenants' preferences and needs in choosing among MVPDs. *See* discussion below at 13.

move out is to offer them no choice whatsoever. To switch MVPDs, these citizens would have to bear the cost and trouble of moving to a new rental unit. For most tenants, moreover, location, rent, and amenities are what primarily drive their choice between apartments; if a building is satisfactory on those three factors, tenants are likely to tolerate inferior MVPD service.[10] MDU owners will understand this, and it will relieve them of any pressure to switch providers.

Moreover, the cost faced by the landlord even if some tenants move out may not be so great. In many of the largest markets, such as New York or San Francisco, and in many of the most desirable buildings, the apartment vacancy rate is so low that even if one tenant vacates, it would take virtually no time or cost for the owner to find a replacement.[11]

Finally, the Commission notes that in the unit-by-unit context, its proposals will actually increase tenant's rights, not restrict them. *FNOPR* at ¶47. This is a circular argument. Unless the landlord permits it, tenants would not be able to benefit from the unit-by-unit scenario.

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[10]That a citizen may choose an MDU building for reasons other than the type of MVPD service it offers does not diminish any infringement on his or her First Amendment right to choose a video provider.

[11]According to the U.S. Census Bureau, the average nationwide rental vacancy rate was 7.9 percent in the second quarter of 1997. "Housing Vacancy Survey, Second Quarter 1997, Table 1: Rental and Homeowner Vacancy Rates for the United States" U.S. Census Bureau (available online at http://www.census.gov/hhes/www/housing/hvs/q297tab1.html). In the San Francisco area, however, this rate was only 3.1 percent, and in New York City it was just 5.5 percent. Housing Vacancy Survey Annual Statistics: 1996, Table 5: Rental Vacancy Rates for the 61 Largest Metropolitan Areas (available online at http://www.census.gov/hhes/www/housing/hvs/annual96/ann96t5.html).

3. Landlords Will Be Reluctant To Switch MVPDs Because They Will Wish To Avoid The Risk Of Damage To The MDU And The Dissatisfaction Of Tenants.

As MAP/CFA noted in their 1996 Comments, MDU owners will be concerned that installation of new home run wiring will cause damage and disruption to the building. 1996 MAP/CFA Comments at 11. Even if the alternative provider would be able to perform the installation with a minimum of damage, the mere perception of costs and obstacles, including the adverse reaction of the building's tenants to the disruption, may be enough to deter the owner from switching or allowing unit-by-unit switches. *Id.* at 6.

4. Landlords Are Unable Effectively To Represent The Needs And Preferences Of Their Tenants.

The Commission has erroneously assumed that even if the MDU owner did decide to switch MVPDs, he or she would be able to select a provider that adequately met the needs of the tenants. This is impossible, because different viewers have different viewing preferences and needs. For example, a sports fan may want to choose a DBS service with coverage of every NFL football and NBA basketball game; a film buff may want to choose a cable system with an attractive package of premium movie channels; and parents may want to choose a DBS service which, after the Commission's implementation of Section 25 of the Cable Act, will offer educational and informational channels, perhaps including distance learning services.[12] No single choice the MDU owner could make would effectively represent the preferences of all tenants.

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[12]*See Public Notice*, Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act, FCC No. 97-24 (released January 31, 1997); *Notice of Proposed Rulemaking*, Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act, 8 FCC Rcd 1589 (1993).

C. The Commission's Proposal Is Flawed Because It Offers Departing Incumbent MVPDs The Opportunity To Remove Wiring, Thereby Creating An Anti-competitive Hurdle For Alternative Providers.

The Commission's proposals allow incumbent MVPDs to choose either to remove, sell, or abandon their home run wiring inside the MDU at such time as the landlord chooses to switch providers, in the building-by-building case, *FNOPR* at ¶35, or to allow MVPDs to compete for individual subscribers, in the unit-by-unit case. *FNOPR* at ¶39.

This part of the proposal is flawed because it could allow the departing incumbent MVPD to remove the wiring for anticompetitive reasons. Removal would force the alternative MVPD to install home run wiring from scratch, adding cost and delay to the alternative MVPD's provision of service to the building. This could lead to service interruptions, and for the alternative MVPD, may add several years to the time before it reaches the break even point. *See* Goldberg Letter.

The incumbent could also use the removal option as either an explicit or implicit threat to deter the MDU owner from switching. Such a threat could involve the prospect of costly and unsightly damage from holes in structural elements of hallways and stairwells, discolored or damaged walls, and removal of hallway molding. That threat would also come with the perception, whether real or imagined, that tenants would be angered by the damage and disruption. Although the Commission's proposal would require incumbents to restore the building to its prior condition, correcting any malfeasance could involve the threat of protracted litigation, a prospect the Commission has admitted is "rarely conducive to generating competition." *FNOPR* at ¶31.

Indeed, cable operators have a long history of employing similar tactics to shut down the

distribution channels of their competitors. For example, as Congress noted in the legislative history of the 1992 Cable Act, for many years cable operators had removed subscribers' TV antennas, promoting it as a benefit of using their service. H.R. Rep. No. 102-628, 102d Cong., 2d Sess. (1992) at 54 ("H.R. Rep."); S. Rep. No. 102-92, 102d Cong., 1st Sess. (1991) at 45 ("S. Rep."). Congress also documented many cases, before the 1992 Cable Act's adoption of the must-carry rules, where cable operators dropped broadcast stations, or moved them to high-numbered channel positions, to make room in preferred positions for affiliated programmers. H.R. Rep. at 54-55; S. Rep. at 43-44. Cable has also sought to control limited DBS orbital slots to forestall the threat of competition from this multichannel video programming source. *See, e.g., Petition to Dismiss or Deny of Office of Communication of United Church of Christ, et al.*, Application of TCI Satellite Entertainment, Inc. and Primestar, Inc., File No. 91-SAT-TC-97 (filed August 22, 1997).

Therefore, the incumbent MVPD should first offer the home run wiring for sale to the subscriber, MDU owner, or alternative provider. Removal or abandonment should be options only ***after*** these parties have declined to purchase the wiring. This would harmonize the home run wiring rules with the Commission's current home wiring rules. 47 CFR §76.802; *Report and Order*, Cable Home Wiring, 8 FCC Rcd 1435, 1437-38 (1993). It would increase citizen choice because it would enable alternative providers to offer service to more MDUs, and would assure owners that switching providers would not involve damage to the building. Nor would this constitute an unlawful taking of the incumbent's property, since the incumbent would receive

just compensation.[13]

IV. THE COMMISSION SHOULD REVISE ITS HOME WIRING PROPOSAL TO GIVE VIEWERS GREATER ACCESS TO HOME WIRING.

Like its proposal for the disposition of home run wiring, the Commission's home wiring proposal unlawfully gives MDU owners, rather than viewers, control over the disposition of home wiring. This not only misconstrues Section 624 of the 1992 Cable Act, it is also unwise policy because it would prevent subscribers from maximizing the use of broadband wiring and from realizing the benefits of competition.

In any event, the Commission should clarify its definition of what is a "physically inaccessible" demarcation point, requiring it to be moved beyond the 12 inches provided by the Commission's rules. It should also require sharing of moldings and conduits wherever possible.

A. Individual Subscribers Should Have The Right Of First Refusal To Purchase Home Wiring In Cases Of Building-By-Building Switches.

The Commission has offered proposals for the disposition of cable home wiring in both building-by-building and unit-by-unit switches. It tentatively concludes that if the MDU owner terminates service for the entire building, the owner (or if the owner declines, the alternative provider) would have the opportunity to buy the home wiring, except in units where the resident

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[13]The Commission's has requested comment on how to determine the proper price that a tenant or MDU owner should pay if the incumbent elects to sell the wiring, or whether negotiation between the parties will produce a reasonable price. *FNOPR* at ¶¶37, 40. The Commission's home wiring rules already contain a method to determine the price of wiring, *i.e.* the replacement cost per foot of the cabling multiplied by the length in feet of the home run wiring. 47 CFR §76.802. MAP/CFA believe that this is a fair method to determine the wiring price, and, given the lack of evidence of its inadequacy, that the Commission should apply it to home run wiring. Moreover, the Commission should clarify that "replacement cost per foot" means the wholesale price per foot. This marketplace measure reflects the cost that would be faced by the incumbent MVPD if it were to purchase new wiring in large amounts.

already owned it. *FNOPR* at ¶¶76-77. The Commission declines to allow individual residents to purchase the home wiring because it believes that it would be "impractical and inefficient for the incumbent provider to deal with each individual subscriber." *Id.* at ¶76.

MAP/CFA disagree with the Commission's decision not to give individual subscribers the option of purchasing their home wiring in building-by-building switchovers. First, the Commission has once again unlawfully subordinated individual choice and placed the MDU owner in a gatekeeper position. Section 624 speaks only of the ***subscriber*** terminating service, not the MDU owner. 47 USC §544(i).[14] Congress' explicitly and clearly stated intent in enacting this provision was to provide individual subscribers with the option to purchase. The Senate Commerce Committee took notice of Commission policy allowing consumers access to telephone wiring and directed that "this is a good policy and should be applied to cable....[T]he FCC should extend its policy to permit ownership of the cable wiring ***by the homeowner***." S. Rep. at 23. Similarly, the House Energy and Commerce Committee stated its belief that "***subscribers*** who terminate service should have the right to acquire wiring...." H.R. Rep. at 118. The Commission itself has noted that "Congress intended for Section 624(i) to promote individual subscriber choice whenever possible." *FNOPR* at ¶81. Indeed, the Commission's rules already give subscribers the first chance to purchase their home wiring in single dwelling units and MDUs that switch on a unit-by-unit basis. *1996 Inside Wiring Further Notice*, 11 FCC Rcd 4561. It would be arbitrary and capricious for the Commission to fail to promote that individual choice here.

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[14]That provision reads, in part, "the Commission shall prescribe rules concerning the disposition, after a subscriber to a cable system terminates service, of any cable installed by the cable operator within the premises of such subscriber." *Id.*

The Congressional mandate of individual subscriber ownership of home wiring is also sound policy. Unlike landlord ownership, it enables subscribers to configure their wiring in a way which maximizes its usefulness, and encourages competition and new entrants for home equipment. *See* 1996 MAP/CFA Comments at 14-16.[15] But this would not be the case if the owner or alternative provider purchases the wire. Instead, MDU owners concerned about structural and aesthetic damage are not likely to permit residents to configure the wiring themselves.

Similarly, allowing alternative providers to purchase home wiring, in cases where the landlord declines, will merely substitute the alternative MVPD for the incumbent. This situation would afford tenants with no greater choice than they presently have.

Contrary to the Commission's initial assessment, it would not be impractical for the incumbent to deal with each individual subscribers' decision to purchase. The procedure necessary to allow subscribers to make this type of election would be very similar to the billing and customer service functions that the incumbents perform every month. Besides, under the Commission's proposal, incumbents would already have established this procedure for single dwelling units and the unit-by-unit MDU case. *FNOPR* at ¶¶79-82.

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[15]MAP and other parties have also argued, in a still-pending Petition for Rulemaking, that the Commission could further these same goals by permitting subscribers to have access to cable home wiring for the delivery of competing and complementary services *before* termination of their current services. Joint Petition for Rulemaking of Media Access Project, United States Telephone Association, and Citizens for a Sound Economy Foundation, filed July 27, 1993, *granted in part, Notice of Proposed Rulemaking*, Inside Wiring, 11 FCC Rcd 2747 (1996).

B. The Commission Should Move The Demarcation Point Outside The Unit Until The Point Where It Becomes Physically Accessible And Should Require Sharing Of Hallway Molding And Conduits Whenever Possible.

If the Commission does adopt its proposal for the disposition of home wiring, it is imperative that it allow alternative MVPDs to compete on a playing field that is as level as possible. Two elements of the Commission's proposal should be clarified to minimize the damage: (1) adjusting the demarcation point where it would otherwise be physically inaccessible and (2) requiring the incumbent MVPD to allow the alternative provider to share the use of hallway molding and conduits if space permits.

1. Physical Inaccessibility

The Commission acknowledges the arguments of several commenters that the cable demarcation point in the unit-by-unit switching scenario, currently 12 inches outside the individual unit, can be physically inaccessible. *FNOPR* at ¶84. For example, it notes that in many MDUs the demarcation point is embedded in brick, metal conduit, or cinder blocks. *Id.* It seeks comment on its tentative conclusion that when this is the case, "the demarcation point should be moved back to the point at which it first becomes physically accessible." *Id.*

As an initial matter, the Commission should ensure that the demarcation point is defined so that it is ***outside*** the subscriber's dwelling, as it is presently. Thus, "moved back" should not mean "moved back into the unit." As MAP/CFA noted in their 1996 Comments, this would add to subscriber cost and inconvenience, and could deter subscribers from switching. 1996 MAP/CFA Comments at 6-7.

To ensure adequate flexibility for tenants and competitive parity among providers, the Commission must adopt a definition of "physically inaccessible" that allows easy access to the

demarcation point. MAP/CFA propose a two part definition. The Commission should ask whether accessing the demarcation point (1) would require modification or damage of preexisting structural elements, and (2) would add significantly to the difficulty and/or cost of accessing the subscriber's home wiring. This definition is directed at both reducing the concerns of MDU owners that switching to an alternative MVPD would risk structural or aesthetic damage to hallways and common areas, and at controlling the installation costs faced by alternative MVPDs. For example, the Commission's illustrations of installing wire through concrete, brick, or tubing, *FNOPR* at ¶84, would require cutting through one or more hallway or floor structural elements and should certainly be deemed inaccessible.

2. Sharing Of Hallway Molding And Conduits

On the other hand, many MDUs are already equipped with molding that houses the subscriber wire and the demarcation point. The Commission has requested comment whether, in cases where there is room inside moldings or conduits to install a second set of home run wiring without interfering with the incumbent's wiring, it should allow the alternative MVPD to install its wiring even over the incumbent's objection. *FNOPR* at ¶83.

This proposal would encourage competition and consumer choice, in that it would reduce the alternative provider's cost to provide service to individual subscribers. This will avoid many instances where the alternative provider would have to install redundant molding or different conduits, or would be foreclosed from competing because of the objections of the MDU owner. There is little pro-competitive reason not to adopt it.

The Commission asks whether this would constitute a taking of the incumbent's property. *FNOPR* at ¶83. To resolve any doubts, the Commission could require alternative MVPDs